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NORTHERN DISTRICT OF CALIFORNIA

**JCS**

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**IN THE UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

**CV 18 80 080 MISC**

ELIZABETH SINES, SETH WISPELWET,  
MARISSA BLAIR, TYLER MAGILL, APRIL  
MUNIZ, HANNAH PEARCE, MARCUS  
MARTIN, JOHN DOE, JANE DOE 1,  
JANE DOE 2, and JANE DOE 3,

Plaintiffs,

vs.

JASON KESSLER, RICHARD SPENCER,  
CHRISTOPHER CANTWELL, JAMES  
ALEX FIELDS, JR., VANGUARD  
AMERICA, ANDREW ANGLIN,  
MOONBASE HOLDINGS, LLC, ROBERT  
"AZZMADOR" RAY, NATHAN  
DAMIGO, ELLIOT KLINE a/k/a/ ELI  
MOSELY, IDENTITY EVROPA, MATTHEW  
HEIMBACH, MATTHEW PARROTT a/k/a  
DAVID MATTHEW PARROTT,  
TRADITIONALIST WORKER PARTY,  
MICHAEL HILL, MICHAEL TUBBS,  
LEAGUE OF THE SOUTH, JEFF SCHOEP,  
NATIONAL SOCIALIST MOVEMENT,  
NATIONALIST FRONT, AUGUSTUS SOL  
INVICTUS, FRATERNAL ORDER OF THE  
ALT-KNIGHTS, MICHAEL "ENOCHE"  
PEINOVICH, LOYAL WHITE KNIGHTS OF  
THE KU KLUX KLAN, and EAST COAST  
KNIGHTS OF THE KU KLUX KLAN a/k/a  
EAST COAST KNIGHTS OF THE TRUE  
INVISIBLE EMPIRE,

Defendants.

Case No. \_\_\_\_\_

*(pending in the United States District  
Court for the Western District of  
Virginia, Case No. 3:17-cv-72)*

**NOTICE OF MOTION AND JANE DOE'S  
MOTION TO QUASH SUBPOENA FOR  
DOCUMENTS TO DISCORD, INC.;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

DATE: TBD  
TIME: TBD  
Hon. TBD  
CTRM: TBD

**RANDAZZA | LEGAL GROUP**

**FILED BY FAX**

**NOTICE OF MOTION AND MOTION**

TO PLAINTIFFS ELIZABETH SINES, SETH ISPELWEY, MARISSA BLAIR, TYLER MAGILL, APRIL MUNIZ, HANNAH PEARCE, MARCUS, MARTIN, JOHN DOE, AND JANE DOES 1-3 AND ALL COUNSEL OF RECORD:

**PLEASE TAKE NOTICE** that on \_\_\_\_\_ at \_\_\_\_\_ at \_\_\_\_\_

\_\_\_\_\_, Jane Doe hereby moves the District Court for the Northern District of California to quash the Subpoena for Documents to non-party Discord, Inc. issued by Plaintiffs on or around January 2, 2018 (the "Subpoena"), pursuant to Fed. R. Civ. P. 45(d)(3)(iii) and (iv); and Cal. Code Civ. Proc. § 1987.1. The Subpoena seeks subscriber information and "All documents and communications to, from, or concerning" Doe, in addition to 48 other accounts. The Subpoena was issued in support of a civil action filed in the United States District Court for the Western District of Virginia on October 11, 2017 captioned *Sines, et al., v. Kessler, et al.*, No. 3:17-cv-00072-NKM-JCH. A date and time at which this motion in this miscellaneous action will be heard are yet to be determined.

As explained in the attached Memorandum of Points and Authorities, Doe is a political dissident who exercises her First Amendment-guaranteed rights of free speech and free association. Due to Doe's political ideas being controversial, Doe engages in political discourse in an anonymous manner by using the handle "kristall.night" on Discord—which is a social media networking website. Doe has a constitutional right to associate with people who think as she does and to engage in controversial political speech anonymously, and the Plaintiffs have no right to acquire her correspondence or information. The subpoena also violates the Stored Communications Act by requesting the contents of online communications stored by Discord.

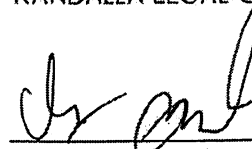
1 For purposes of First Amendment-related matters, standing is relaxed, and  
2 the Court should quash the subpoena at issue as it pertains to the other 48 Discord  
3 accounts, too. If the Court does not quash the subpoena as it pertains to the  
4 other 48 Discord accounts, then Doe's identity can nevertheless be exposed,  
5 which is anathema to the United States Constitution.

6 For the reasons set forth in Jane Doe's Memorandum of Points and  
7 Authorities in Support of Her Motion to Quash Subpoena for Documents to  
8 Discord, Inc., the Court can and should quash the subpoena at issue.

9  
10 Dated: May 16, 2018.

Respectfully Submitted,

RANDAZZA LEGAL GROUP, PLLC



Marc J. Randazza, CA Bar No. 269535

Alex J. Shepard, CA Bar No. 295058

*Attorneys for Jane Doe*

## MEMORANDUM OF POINTS AND AUTHORITIES

### **1.0 INTRODUCTION AND STATEMENT OF FACTS**

Doe is a political dissident who exercises her First Amendment-guaranteed rights of free speech and free association. Due to Doe's political ideas being controversial, Doe engages in political discourse anonymously by using the handle "kristall.night" on Discord—which is a social media networking website.

In the above-captioned civil action (the "Underlying Suit"), Plaintiffs have subpoenaed Discord, Inc. ("Discord") to acquire the subscriber information and "All documents and communications to, from, or concerning" Doe, in addition to 48 other Discord accounts (the "Subpoena"). (See subpoena to Discord, attached as Exhibit 1.) To create an account on Discord, a user must provide an email address. (See Discord "Register" page, attached as Exhibit 2.)<sup>1</sup>

Plaintiffs are attempting to identify people who espouse "Alt-Right" political views and who attended or were sympathetic with the Alt-Right activists who attended the notorious "Unite the Right" rally in Charlottesville, Virginia, on August 12, 2017 (the "Rally"). Plaintiffs bring multiple claims based on the alleged acts of the numerous named Defendants related to discussing and allegedly coordinating violence that occurred during the Rally, culminating with an automobile striking multiple protestors. (See, generally, Amended Complaint, attached as Exhibit 3.) Plaintiffs allege in the Amended Complaint that Defendants and unidentified "co-conspirators" used Discord to communicate with each other and coordinate their conduct at the Rally. The Discord servers allegedly used by Defendants and their "co-conspirators" are not public. (See Exhibit 3 at ¶¶ 71-83.) However, while the Amended Complaint makes numerous references to unidentified "co-conspirators," Plaintiffs do not actually name any

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<sup>1</sup> Available at: <<https://discordapp.com/register>> (last accessed May 15, 2018).

such individuals as "John Doe" defendants. It is thus critically important to keep in mind that Plaintiffs only bring claims against the named Defendants, and not against Jane Doe or any of the other 48 unidentified Discord users.

Since Plaintiffs are not attempting to discover the identities of unnamed Doe defendants, it appears that the Subpoena is merely attempting to obtain the identities of third parties for the purpose of outing them as members of the "Alt-Right." Alt-Right activists who are outed for adhering to this controversial political philosophy and/or for having attended the Charlottesville rally have been disowned by their families and lost their jobs. (See Jessica Suerth, "The white nationalist whose father disowned him says family was doing the 'safest thing,'" CNN (Aug. 15, 2017), attached as **Exhibit 4**;<sup>2</sup> see also Haley Britzky, "Charlottesville marchers have been fired, disowned, arrested," AXIOS (Aug. 24, 2017), attached as **Exhibit 5**;<sup>3</sup> and see ECF No. 244 in Underlying Suit, Declaration of John Doe in Support of John Doe's Motion to Quash, attached as **Exhibit 6**, at ¶¶ 11-14.) Groups opposed to members of the "Alt-Right" have a habit of "doxxing" these individuals, a practice of revealing someone's personal information to the general public. (See Decca Muldowney, "Doxx Racists: How Antifa Uses Cyber Shaming to Combat the Alt-Right," Pacific Standard (Nov. 2, 2017), attached as **Exhibit 7**;<sup>4</sup> see also Steven Blum, "Doxxing White Supremacists is Making Them Terrified," Vice (Aug. 15, 2017), attached as **Exhibit 8**.)<sup>5</sup> Organizations opposed to members of the "Alt-Right," such as "antifa," are likely to physically harm Jane

<sup>2</sup> Available at: <<https://www.cnn.com/2017/08/15/us/dad-charlottesville-rally-letter-trnd/index.html>> (last accessed May 15, 2018).

<sup>3</sup> Available at: <<https://www.axios.com/charlottesville-marchers-have-been-fired-disowned-arrested-1513305052-24ec82c9-0d70-496e-8889-8d309aa562e7.html>> (last accessed May 15, 2018).

<sup>4</sup> Available at: <<https://psmag.com/news/doxxing-the-alt-right-racists>> (last accessed May 15, 2018).

<sup>5</sup> Available at: <[https://broadly.vice.com/en\\_us/article/7xxbez/doxxing-white-supremacists-is-making-them-terrified](https://broadly.vice.com/en_us/article/7xxbez/doxxing-white-supremacists-is-making-them-terrified)> (last accessed May 15, 2018).

1 Doe and other Discord users if their identities and political affiliations are revealed.  
 2 (See Paul M. Murphy, "White nationalist Richard Spencer punched during  
 3 interview," CNN (Jan. 21, 2017), attached as Exhibit 9;<sup>6</sup> see also Kyle Swenson,  
 4 "Black-clad Antifa members attack peaceful right-wing demonstrators in  
 5 Berkeley," Washington Post (Aug. 28, 2017), attached as Exhibit 10.)<sup>7</sup>

6 The Subpoena, or at least Document Request No. 7 of the Subpoena, thus  
 7 appears to be an abuse of process calculated solely for the purpose of causing  
 8 personal and reputational harm to people who espouse unpopular political  
 9 beliefs. Indeed, it is very likely that Jane Doe and the other 48 Discord users will  
 10 suffer the kind of harassment, injuries, and even physical harm alleged in the  
 11 Amended Complaint if their identities and communications are made publicly  
 12 available.

13 There is thus a substantial risk that disclosure of the identities and private  
 14 communications of Jane Doe and other Discord users, third parties against whom  
 15 Plaintiffs do not bring any claims, would result in a chilling effect by causing  
 16 members espousing an "Alt-Right" ideology and associating with groups that  
 17 espouse such ideologies from stating these views and from associating with such  
 18 groups. Furthermore, Plaintiffs' subpoena violates the Stored Communications  
 19 Act by broadly requesting both the identities of Discord users *and* the contents of  
 20 all their communications stored on that platform.

21 For the reasons set forth in this Brief, the Court can and should quash the  
 22 subpoena because political dissidents have a right to engage in controversial  
 23 political speech and to associate with like-minded people without being outed.  
 24

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25 <sup>6</sup> Available at: <<https://www.cnn.com/2017/01/20/politics/white-nationalist-richard-spencer-punched/index.html>> (last accessed May 15, 2018).

26 <sup>7</sup> Available at: <[https://www.washingtonpost.com/news/morning-mix/wp/2017/08/28/black-clad-antifa-attack-right-wing-demonstrators-in-berkeley/?utm\\_term=.47a8b9ee7d37](https://www.washingtonpost.com/news/morning-mix/wp/2017/08/28/black-clad-antifa-attack-right-wing-demonstrators-in-berkeley/?utm_term=.47a8b9ee7d37)> (last  
 27 accessed May 15, 2018).



## 2.0 LEGAL STANDARDS

When a party seeks discovery that encroaches upon First Amendment freedoms, the party must show that the "information sought is *highly relevant* to the claims or defenses in the litigation – a more demanding standard of relevance than that under Federal Rule of Procedure 26(b)(1)." *Perry v. Schwarzenegger*, 591 F.3d 1126, 1141 (9th Cir. 2010) (emphasis added). The discovery request must also be "carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." *Id.*

The Court must also quash a subpoena if it "requires disclosure of privileged or other protected matter" or "subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iii), (iv). Similarly, under Cal. Code Civ. Proc. § 1987.1, a court may quash a subpoena and "make any other order as may be appropriate to protect the person from unreasonable or oppressive demands, including unreasonable violation of the right of privacy of the person." Section 1987.1(b)(5) specifically authorizes "[a] person whose personally identifying information . . . is sought in connection with an underlying action involving that person's exercise of free speech rights" to bring a motion to quash.<sup>8</sup>

Discord is located in San Francisco, California, and the Subpoena requires compliance in Oakland, California. This Court is the appropriate venue for this motion because Fed. R. Civ. P. 45 instructs that "the court for the district where compliance is required" has primary authority over all subpoena-related motions

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<sup>8</sup> While nominally procedural, the articulated protections for anonymous speakers in Cal. Code Civ. Proc. § 1987.1 are substantive and are based upon the same free speech concerns that animate California's Anti-SLAPP statute. See, e.g., *United States ex rel. Newsham v. Lockheed Missiles and Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999) (holding that California's Anti-SLAPP statute is substantive in design and intent and thus applies in federal court). Section 1987.1's protections thus apply to any non-federal claims based on the exercise of First Amendment rights, which is precisely what Plaintiffs' claims are.

made under that rule. Fed. R. Civ. P. 45(d), (e), (f), (g); see also *United States ex rel. Ortiz v. Mt. Sinai Hosp.*, 169 F. Supp. 3d 538, 543 (S.D.N.Y. 2016).

### 3.0 ARGUMENT

#### 3.1 Jane Doe Has Standing to Move to Quash the Subpoena on Behalf of Herself and Those Similarly Situated as Her

Fed. R. Civ. P. 45(d)(3)(a)(iii), (iv) requires a court to quash a subpoena, on timely motion if it "requires disclosure of privileged or other protected matter," or it "subjects a person to undue burden." Though Jane Doe and the other 48 Discord users are not parties required to comply with the Subpoena, the Subpoena seeks information about them, including information that could lead to disclosure of their identities, as well as the contents of communications to and from these users. (See Exhibit 1 at Request No. 7.) Jane Doe is obviously affected by the Subpoena, as it could lead to disclosure of such information as to her. She thus has standing to bring this motion.

Jane Doe also has standing to challenge not only the Subpoena as it pertains to her, but for the other 48 similarly situated Discord users. "Standing is relaxed in the First Amended context 'because of a judicial prediction or assumption that the policy's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Faith Baptist Church v. Waterford Township*, 522 Fed.Appx. 322, 330 (6th Cir. 2013) (quoting *Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); see also *Sec. of State of Md. V. Joseph H. Munson, Co., Inc.*, 467 U.S. 947, 956-57 (1984)).

Even if the Court finds that Jane Doe does not have standing to assert the First Amendment rights of third parties, it may quash an improperly issued subpoena *sua sponte*. See *Rodrigues v. Ryan*, 2018 U.S. Dist. LEXIS 33260, \*5-6 (D.



1 Ariz. Feb. 28, 2018); see also *Elite Lightning v. DMF, Inc.*, 2013 U.S. Dist. LEXIS 201677  
 2 (C.D. Cal. May 6, 2013).

3 **3.2 The Subpoena Requires Disclosure of Privileged or Other Protected**  
 4 **Matter and Subjects Jane Doe and Similarly Situated Users to Undue**  
 5 **Burden**

6 **3.2.1 The First Amendment Right to Anonymous Speech**

7 The Subpoena should be quashed in its entirety because it violates the First  
 8 Amendment rights to anonymous speech and association of Jane Doe and other  
 9 Discord users. "It is now settled that 'an author's decision to remain anonymous,  
 10 like other decisions concerning omissions or additions to the content of a  
 11 publication, is an aspect of the freedom of speech protected by the First  
 12 Amendment.'" See *Anonymous Online Speakers v. U.S. Dist. Court*, 661 F.3d 1168,  
 13 1173 (9th Cir. 2011) (quoting *Talley v. California*, 362 U.S. 60, 64-65 (1960)). The  
 14 protections apply equally to speech on the Internet. See *Reno v. ACLU*, 521 U.S.  
 15 844, 870 (1997); see also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42  
 16 (1995); and see *Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash.  
 17 2001) (finding "[t]he right to speak anonymously extends to speech via the  
 18 Internet. Internet anonymity facilitates the rich, diverse, and far ranging  
 19 exchange of ideas"). Internet users also enjoy a First Amendment interest in their  
 20 Internet subscriber information. See *Anonymous Online Speakers*, 661 F.3d at  
 21 1173; see also *Doe v. SEC*, 2011 U.S. Dist. LEXIS 132983, \*8 (N.D. Cal. Nov. 17, 2011).

22 There is no doubt that Jane Doe—as well as the 48 other Discord users—  
 23 have controversial political ideas, and that if Discord complies with the Subpoena  
 24 said individuals will be outed. Even if Discord users are not required to provide  
 25 their full names to create an account with the service, there is an extremely high  
 26 probability that a reader could learn the identity of a Discord user if they have  
 27 access to all communications to or from that user. This can and will result in serious

1 harm to their personal and professional lives; specifically, there is a strong  
 2 likelihood that they would lose their employment and/or be socially ostracized if  
 3 their identities and the contents of their non-public messages are made public.  
 4 (See **Exhibits 4-10**.) This result would have an unconstitutional chilling effect on  
 5 the First Amendment rights of these and other users; the fear of a service provider  
 6 like Discord disclosing the identities and contents of communications that users  
 7 thought were confidential would lead to a significant degree of self-censorship.

8 In *National Association for the Advancement of Colored People v.*  
 9 *Patterson*, 357 U.S. 449 (1958), the United States Supreme Court ruled that a  
 10 subpoena could not be used to identify the members of the NAACP because  
 11 such would have a chilling effect on the First Amendment. As was said by the  
 12 Supreme Court:

13 Effective advocacy of both public and private points of view,  
 14 particularly controversial ones, is undeniably enhanced by group  
 15 association, as this Court has more than once recognized by  
 16 remarking upon the close nexus between the freedoms of speech  
 17 and assembly. *De Jonge v. Oregon*, 299 U.S. 353, 364; *Thomas v.*  
 18 *Collins*, 323 U.S. 516, 530. It is beyond debate that freedom to  
 19 engage in association for the advancement of beliefs and ideas is  
 20 an inseparable aspect of the "liberty" assured by the Due Process  
 21 Clause of the Fourteenth Amendment, which embraces freedom of  
 22 speech. See *Gitlow v. New York*, 268 U.S. 652, 666; *Palko v.*  
*Connecticut*, 302 U.S. 319, 324; *Cantwell v. Connecticut*, 310 U.S. 296,  
 303; *Staub v. City of Baxley*, 355 U.S. 313, 321. Of course, it is  
 immaterial whether the beliefs sought to be advanced by  
 association pertain to political, economic, religious or cultural  
 matters, and state action which may have the effect of curtailing the  
 freedom to associate is subject to the closest scrutiny.

23 NAACP, 357 U.S. at 460-461. While the group of users on the Discord servers  
 24 Plaintiffs identify may not have all the formalities of the NAACP, it is no less an  
 25 organization of like-minded individuals sharing their political beliefs and  
 26  
 27

1 advocating for social change, no matter how noxious Plaintiffs may find this  
2 advocacy to be.

3 The degree of scrutiny a court should apply in determining whether a  
4 party's interests outweigh these First Amendment interests depends on the nature  
5 of the speech at issue. See *Anonymous Online Speakers*, 661 F.3d at 1173. First  
6 Amendment protection is "at its zenith" when concerning "core political speech."  
7 *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988). While Plaintiffs assert that the  
8 conduct of **Defendants** is unlawful, there are no similar allegations as to the  
9 speech of Jane Doe or other Discord users. The information requested by the  
10 Subpoena consists of private online communications without any allegation of  
11 such communications being in any way unlawful. It quite obviously amounts to  
12 nothing more than a fishing expedition so that Plaintiffs will be able to identify and  
13 "doxx" people who espouse political beliefs with which Plaintiffs disagree.

14 Anonymous online speakers are entitled to a limited privilege under the First  
15 Amendment, which a court **must** consider before allowing discovery. See *Buckley*  
16 *v. Am. Constitutional Law Found.*, 525 U.S. 182, 192 (1999); *Sony Music Entm't Inc.*  
17 *v. Does 1-40*, 326 F. supp. 2d 556, 565 (S.D.N.Y. 2004); *Grandbouche v. Clancy*, 825  
18 F.2d 1463, 1466 (10th Cir. 1987). This Court has recognized that "[p]eople who  
19 have committed no wrong should be able to participate online without fear that  
20 someone who wishes to harass or embarrass them can file a frivolous lawsuit and  
21 thereby gain the power of the court's order to discover their identity." *Columbia*  
22 *Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

23 These concerns would require the Court to quash the Subpoena even if it  
24 were directed solely at the individuals identified in the Subpoena. That is not the  
25 case here, however. The Subpoena requests "[a]ll documents and  
26 communications **to, from, or concerning**" these individuals. (**Exhibit 1** at Request  
27 No. 7.) This means that the Subpoena seeks not only communications from the

1 identified Discord users, but also communications to anyone who either sent these  
 2 users a message, received a message from these users, or who even talked about  
 3 these users. The scope of the Subpoena thus potentially extends to thousands of  
 4 unidentified individuals, many of whom likely have no relationship whatsoever  
 5 with any party to this case or to the facts of the case. Despite this, the Subpoena  
 6 seeks to violate the First Amendment right to anonymity and association for all of  
 7 these users. The Constitution does not permit this.

### 8 **3.2.2 Plaintiffs Cannot Overcome the Constitutional Right to Anonymity of** 9 **Jane Doe and Other Non-Parties**

10 Courts use a balancing test to determine when disclosure of a speaker's  
 11 identity is appropriate. The Court should look to the 4-factor test for this scenario  
 12 articulated in *Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001):

- 13 (1) The subpoena seeking the information was issued in good faith and not  
 14 for any improper purpose;
- 15 (2) The information sought relates to a core claim or defense;
- 16 (3) The identifying information is directly and materially relevant to that  
 17 claim or defense; and
- 18 (4) Information sufficient to establish or to disprove that claim or defense is  
 19 unavailable from any other source.

20 This Court has approved of the *2theMart.com* test where, as here, a subpoena  
 21 seeks identifying information of non-parties. The Ninth Circuit has also found that  
 22 an even higher standard is appropriate where a subpoena is directed at political  
 23 speech, and that a plaintiff must be able to withstand a hypothetical motion for  
 24 summary judgment for disclosure to be appropriate. See *Anonymous Online*  
 25 *Speakers*, 661 F.3d at 1176-77. Under either standard, Plaintiffs fail.

26 First, the Subpoena was not issued in good faith. It seeks the personal  
 27 identifying information and personal communications of non-parties who express

1 unpopular political views. Plaintiffs are not attempting to uncover the identities of  
2 additional defendants, as the Amended Complaint does not name any Doe  
3 defendants. It is clear that Plaintiffs are simply looking for a way to uncover the  
4 names and personal information of "Alt-Right" adherents so that they can then  
5 subject such people to threats of harassment, violence, and loss of personal and  
6 professional reputation. The Subpoena is a fishing expedition with the ultimate  
7 goal of destroying the lives of people Plaintiffs do not like, even though these  
8 people have done nothing to harm Plaintiffs. This intent is obvious given the scope  
9 of the Subpoena. As discussed in Section 3.2.3, *infra*, the Subpoena seeks the  
10 information of anyone who has ever communicated with Jane Doe or other  
11 Discord users, whether or not those communications have anything to do with the  
12 "Alt-Right" movement or the Rally.

13 Second and third, Plaintiffs must show that the requested information  
14 relates to a core claim or defense and that the identifying information is directly  
15 and materially relevant to that claim or defense. See *2theMart.com*, 140 F. Supp.  
16 2d at 1096. It is impossible to determine how many people are likely to be caught  
17 up in the Subpoena's dragnet if Discord complies with it, since it could require  
18 production of communications from thousands of Discord users completely  
19 unrelated to this case or any of the parties. There is no possible explanation as to  
20 how more than a small fraction of the requested information could possibly be  
21 relevant to any claim or defense, particularly since Plaintiffs' Amended Complaint  
22 does not name any unidentified Discord users as John or Jane Doe defendants.

23 Fourth, there is no indication that the requested information is unavailable  
24 from any other source. Plaintiffs have identified numerous Defendants that they  
25 claim orchestrated the Rally. They have not named any John Doe or Jane Doe  
26 defendants. This means that named Defendants were a party to any  
27 communication relevant to Plaintiffs' claims. Thus, Plaintiffs may obtain any

1 relevant communications from Plaintiffs, rather than asking Discord to produce  
2 the entire Discord message histories of non-parties.

3 Plaintiffs' Subpoena violates the First Amendment rights of Jane Doe and  
4 other non-parties, and must be quashed.

### 5 **3.2.3 The First Amendment Right to Association**

6 Individuals have a First Amendment right to associate and express political  
7 views as a group. See *NAACP v. Alabama*, 357 U.S. 449, 460-62 (1958) (overturned  
8 on unrelated grounds in *NAACP v. Alabama*, 360 U.S. 240 (1959)). This is a right  
9 intertwined with freedom of expression and "like free speech, lies at the  
10 foundation of a free society." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). This is a  
11 critical constitutional protection because "[e]ffective advocacy of both public  
12 and private points of view, particularly controversial ones, is undeniably  
13 enhanced by group association." *NAACP v. Alabama*, 357 U.S. at 460. The  
14 Supreme Court has found that disclosure of membership lists can harm freedom  
15 of association because "it may induce members to withdraw from the association  
16 and dissuade others from joining it because of fear of exposure of their beliefs  
17 shown through their associations and of the consequences of their exposure." *Id.*  
18 at 462-63; see also *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960); and see  
19 *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963). Anonymity  
20 in group membership is linked to the freedom of association, particularly where  
21 the group in question has unpopular views; "[i]nviolability of privacy in group  
22 association may in many circumstances be indispensable to preservation of  
23 freedom of association, particularly where a group espouses dissident beliefs."  
24 *NAACP v. Alabama*, 357 U.S. at 462.

25 Plaintiffs' Subpoena seeks "[a]ll documents and communications to, from,  
26 or concerning the following individuals, **including user information** about the  
27 following individuals' Discord accounts, as well as any images or documents



1 posted by the following individuals." (Exhibit 1 at Request No. 7) (emphasis  
 2 added.) At the very least, the Subpoena seeks the email addresses of Jane Doe  
 3 and 48 other individuals used to create accounts with Discord. (See Exhibit 2.)  
 4 There is also likely to be a substantial amount of personally identifying information  
 5 contained within the private communications between these individuals and  
 6 other non-parties. While many, perhaps even most, Americans disagree with the  
 7 goals espoused by members of the "Alt-Right," the movement's members have  
 8 a right to political advocacy, and a right to do so anonymously.

#### 9 **3.2.4 Plaintiffs Cannot Overcome the First Amendment Right of Association** 10 **of Jane Doe and Other Non-Parties**

11 The First Amendment right to association is not absolute, and  
 12 "[i]nfringements on that right may be justified by regulations adopted to serve  
 13 compelling state interests, unrelated to the suppression of ideas, that cannot be  
 14 achieved through means significantly less restrictive of associational freedoms."  
 15 *Robers v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). The government must justify  
 16 intrusion on this right when governmental action "would have the practical effect  
 17 'of discouraging' the exercise of constitutionally protected political rights."  
 18 *NAACP*, 357 U.S. at 461 (quoting *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 393  
 19 (1950)). Because such actions have a chilling effect on the exercise of First  
 20 Amendment rights, they "must survive exacting scrutiny." *Buckley*, 424 U.S. at 64.

21 The Ninth Circuit has a two-part test for determining whether a First  
 22 Amendment privilege applies in discovery. The party asserting the privilege "must  
 23 demonstrate . . . a 'prima facie showing of arguable first amendment  
 24 infringement.'" *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 349-  
 25 50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133  
 26 (9th Cir. 1983) (per curiam)). The party must show "that enforcement of the  
 27 [discovery requests] will result in (1) harassment, membership withdrawal, or

discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Id.* at 350. Next, the party seeking discovery must "demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest . . . [and is] the 'least restrictive means' of obtaining the desired information." *Id.* Specifically, the Ninth Circuit balances the interests of the parties and takes into account (1) "the importance of the litigation;" (2) "the centrality of the information sought to the issues in the case;" (3) "the existence of less intrusive means of obtaining the information;" and (4) "the substantiality of the First Amendment interests at stake." *Perry*, 591 F.3d at 1140-41. The party seeking discovery also "must show that the information sought is highly relevant to the claims or defenses in the litigation – a more demanding standard of relevance than that under [Fed. R. Civ. P.] 26(b)(1).<sup>9</sup> The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." *Id.* at 1141.

There is no question here that Discord's compliance with the Subpoena will cause substantial First Amendment harm to Jane Doe and other non-parties. These parties have an objectively reasonable fear of being subjected to harassment, physical violence, loss of employment, and destruction of personal relationships if their affiliation with the "Alt-Right" is made public. (See **Exhibits 4-10**.) Compliance with the Subpoena would also have the inevitable effect of causing members of this political movement to withdraw from it to avoid such consequences in the future. Jane Doe thus satisfies her burden under the first prong of this analysis. The burden now shifts to Plaintiffs.

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<sup>9</sup> It is important to note that *Perry* was decided in 2010, before the current version of Rule 26 introduced the "proportionality" requirement in discovery. It would thus appear that the burden on the party seeking discovery to provide relevance has only increased over time.

The second prong of the right of association test is similar to the *2theMart.com* test. For the reasons explained in Section 3.2.2, *supra*, Plaintiffs cannot meet their burden under this prong. Plaintiffs' subpoena is wildly overbroad and seeks little to no information relevant to any claim or defense. The only relevant information exchanged on Discord consists of communications to which the named Defendants are a party, and thus can be obtained through conventional discovery on Defendants, rather than non-parties. The First Amendment issues presented by the Subpoena are also significant; if the Court requires Discord to comply with the Subpoena, it will give free license to plaintiffs to file only nominally meritorious suits based on disfavored speech (regardless of whether anything about the speech is actionable) and then use the discovery process to expose the identities of authors of unpopular speech. The First Amendment right to association is meant to avoid exactly this outcome, and the Court must quash Plaintiffs' Subpoena.

### **3.2.5 The Subpoena is Grossly Disproportionate, Overbroad, and Unduly Burdensome**

Document Request No. 7 of the Subpoena requests "[a]ll documents and communications to, from, or concerning the following individuals, including user information about the following individuals' Discord accounts, as well as any images or documents posted by the following individuals." (See **Exhibit 1** at Document Request No. 7.) Constitutional concerns aside, this request is problematic for multiple reasons. A court may quash a subpoena that is overbroad or seeks irrelevant information. See *Grand Jury Subpoena v. Kitzhaber*, 828 F.3d 1083, 1088 (9th Cir. 2016) (finding that subpoena requesting electronic communications not within scope of legitimate government concern could not be enforced);

1 Fed. R. Civ. P. 26(b) defines the scope of discovery, and provides that  
 2 "[p]arties may obtain discovery regarding any nonprivileged matter that is  
 3 relevant to any party's claim or defense **and proportional to the needs of the**  
 4 **case**, considering the importance of the issues at stake in the action, the amount  
 5 in controversy, the parties' relative access to relevant information, the parties'  
 6 resources, **the importance of the discovery in resolving the issues**, and whether  
 7 the burden or expense of the proposed discovery outweighs its likely benefits."  
 8 Because Plaintiffs' Subpoena seeks information related to First Amendment-  
 9 protected activities, Plaintiffs must go beyond the requirements of Rule 26 and  
 10 show that the requested information is "highly relevant" to claims or defenses.  
 11 *Perry*, 591 F.3d at 1141. The discovery request must also be "carefully tailored to  
 12 avoid unnecessary interference with protected activities, and the information  
 13 must be otherwise unavailable." *Id.* Plaintiffs' request completely fails this test.

14 Request No. 7 is not in any way limited in scope. Plaintiffs' claims, to the  
 15 extent they involved Discord, are based on alleged coordination of violent  
 16 conduct at the Rally through Discord on specific Discord servers. However,  
 17 Request No. 7 is not limited to this subject matter, and instead seeks all  
 18 communications to or from several Discord accounts, whether or not such  
 19 communications are in any way related to the events alleged in the Amended  
 20 Complaint. It thus calls for private communications on every possible subject, and  
 21 requires disclosure of communications on both personal and private matters with  
 22 no bearing whatsoever on this case. There is no possibility that this request is  
 23 "proportional to the needs of the case" given that it explicitly requests mounds of  
 24 irrelevant information.

25 Even worse, the request seeks all communications "to, from, or concerning"  
 26 the operators of the Discord accounts, meaning that necessarily requests  
 27 communications by additional third parties that likely have no relationship

1 whatsoever with any party to this case or even any of the facts of this case. If a  
 2 personal friend of Jane Doe's sent her a recipe for chocolate cake over Discord,  
 3 the Subpoena would require disclosure of it, prejudicing both Jane Doe's rights  
 4 and those of her friend.

5 The patently abusive scope of the Subpoena is similar to the subpoena at  
 6 issue in *Theofel v. Farey-Jones*, 359 F.3d 1066 (9<sup>th</sup> Cir. 2004). The plaintiff in that  
 7 case sent a subpoena to a defendant's email host, demanding all of the  
 8 defendant's emails without limiting the scope temporally or to litigation's subject  
 9 matter. See *id.* at 1071. The Ninth Circuit recognized this practice as abusive,  
 10 noting that "[o]ne might have thought . . . that the subpoena would request only  
 11 e-mail related to the subject matter of the litigation, or may messages sent during  
 12 some relevant time period, or at the very least those sent to or from employees in  
 13 some way connected to the litigation." *Id.*

14 The Subpoena is improper under Fed. R. Civ. P. 26. The Court must quash it.

### 15 **3.3 The Court Should Quash the Subpoena Because it Violates the Stored** 16 **Communications Act**

17 The Stored Communications Act (the "SCA"), 18 U.S.C. § 2702, prohibits any  
 18 "person or entity providing an electronic communication service to the public"  
 19 from "knowingly divulge[ing] to any person or entity the contents of a  
 20 communication while in electronic storage by that service." 18 U.S.C. § 2702(a).  
 21 Document Request No. 7 of the Subpoena requests "[a]ll **documents and**  
 22 **communications** to, from, or concerning the following individuals, including user  
 23 information about the following individuals' Discord accounts, as well as any  
 24 **images or documents** posted by the following individuals." (See Exhibit 1 at  
 25 Document Request No. 7) (emphasis added.) The sweep of this document  
 26 request is broad, and by its plain terms includes identifying information related to  
 27 Discord accounts and the contents of communications both to and from



1 individuals operating these accounts. Thus, Discord may be civilly liable if it  
2 complies with the Subpoena. See 18 U.S.C. § 2707 (conferring standing on any  
3 "subscriber, or other person aggrieved by any violation of this chapter" to bring a  
4 private action for violations). Plaintiffs and their counsel may even be civilly liable  
5 if Discord complies with the Subpoena.

6 **4.0 CONCLUSION**

7 For the foregoing reasons, the Court should grant this motion and quash  
8 Plaintiffs' Subpoena.

9  
10 Dated: May 16, 2018.

Respectfully Submitted,  
RANDAZZA LEGAL GROUP, PLLC

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Case No. \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 16<sup>th</sup> day of May 2018, I served a true and correct copy of the foregoing document upon counsel listed below via electronic mail and U.S. Mail:

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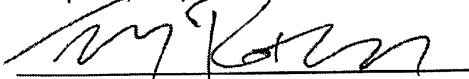
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